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In the
Supreme Court of the United States

MICHAEL BODAK, JR., CLERK

OCTOBER TERM, 1978

NO. **78-850**

GEORGE MORRIS

Petitioner

versus

STATE OF TEXAS,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE COUNTY CRIMINAL COURT OF
HUNT COUNTY, TEXAS

Joseph A. Pitner
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OF THE UNITED STATES

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NO.

GEORGE MORRIS,

Petitioner

vs.

THE STATE OF TEXAS

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
COUNTY CRIMINAL COURT OF HUNT COUNTY,
TEXAS

The Petitioner, GEORGE MORRIS, prays that a writ of certiorari issue to review the final judgment of conviction of the County Criminal Court of Hunt County, Texas, rendered in these proceedings on August 31, 1978.

OPINIONS BELOW

This case originated as a Sunday Blue Law criminal proceeding in the Justice Court of Hunt County, Texas, and was appealed to the County Criminal Court for a trial de novo. Neither court below rendered a formal opinion. The statement of Facts of the County Criminal Court are reproduced in full as Appendix B to this Petition.

JURISDICTION

Petitioner was convicted on August 31, 1978, in the Coun-

ty Criminal Court of Hunt County, Texas. This Petition for Certiorari has been filed less than 90 days from the date aforesaid. The jurisdiction of the Supreme Court to review this decision by writ of certiorari is invoked under 28 U.S.C. § 1257(3) to review a final judgment by the highest state court in which a decision could be had, and where the federal question presented is substantial. Petitioner has been convicted of a criminal offense which does not carry a punishment sufficient to meet the jurisdictional requirements for an appeal from the County Criminal Court to a higher state court, which court would be the Texas Court of Criminal Appeals, the highest state court of criminal jurisdiction.¹

QUESTIONS PRESENTED

Is Article 9001, Texas Revised Civil Statutes, when applied as a criminal law, so vague to men of common intelligence that the law offends the due process clause of the 14th Amendment?

The federal question sought to be reviewed was raised for the first time in the County Criminal Court by Petitioner's pre-trial motion to quash the complaint and information filed against him. Oral argument on the motion was received by the County Criminal Court on the date of trial and denied.

1. Texas Code of Criminal Procedure, Articles 4.01 and 4.03.

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV, § 1:

". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ."

TEXAS REVISED CIVIL STATUTES, ARTICLE 9001:

Art. 9001. Sale of goods on both the two consecutive days of Saturday and Sunday

Prohibition of sales; items; misdemeanor

Section 1. Any person, on both the two (2) consecutive days of Saturday and Sunday, who sells or offers for sale or shall compel, force or oblige his employees to sell any clothing; clothing accessories; wearing apparel; footwear; headwear; home, business, office or outdoor furniture; kitchenware; kitchen utensils; china; home appliances; stoves; refrigerators; air conditioners; electric fans; radios; television sets; washing machines; driers; cameras; hardware; tools, excluding non-power driven hand tools; jewelry; precious or semi-precious stones; silverware; watches; clocks; luggage; motor vehicles; musical instruments; recordings; toys, excluding items customarily sold as novelties and souvenirs; mattresses; bed coverings; household linens; floor coverings; lamps; draperies; blinds; curtains; mirrors; lawn mowers or cloth

piece goods shall be guilty of a misdemeanor. Each separate sale shall constitute a separate offense.

Sales for charitable and funeral or burial purposes; real property sales

Sec. 2. Nothing herein shall apply to any sale or sales for charitable purposes or to items used for funeral or burial purposes or to items sold as a part of or in conjunction with the sale of real property.

First offense; subsequent convictions; penalties

Sec. 3. For the first offense under this Act, the punishment shall be by fine of not more than One Hundred Dollars (\$100.00). If it is shown upon the trial of a case involving a violation of this Act that defendant has been once before convicted of the same offense, he shall on his second conviction and on all subsequent convictions be punished by imprisonment in jail not exceeding six (6) months or by a fine of not more than Five Hundred Dollars (\$500.00), or both.

Purpose; public nuisances; injunctions; application and proceedings

Sec. 4. The purpose of this Act being to promote the health, recreation and welfare of the people of this state, the operation of any business whether by any individual, partnership or corporation contrary to the provisions of this Act is declared to be a public nuisance and any person may

apply to any court of competent jurisdiction for and may obtain an injunction restraining such violation of this Act. Such proceedings shall be guided by the rules of other injunction proceedings.

Emergency purchases; certification

Sec. 4a. Repealed by Acts 1967, 60th Leg., p. 79, ch. 39, §1, eff. Aug. 28, 1967.

Occasional sales

Sec. 5. Occasional sales of any item named herein by a person not engaged in the business of selling such item shall be exempt from this Act.

Legislative intent

Sec. 5a. It is the intent of the Legislature that Articles 286 and 287 of the Penal Code of Texas are not to be considered as repealed by this Act; provided, however, that the provisions of said Articles shall not apply to sales of items listed in Section 1 of this Act which are forbidden to be sold on the day or days named in this Act. Acts 1961, 57th Leg., 1st C.S., p. 38, ch. 15, eff. Nov. 7, 1961.

TEXAS CODE OF CRIMINAL PROCEDURE,
ARTICLE 401:

Article 4.01, [51] [63] [64] What courts have criminal jurisdiction

The following courts have jurisdiction in criminal actions:

1. The Court of Criminal Appeals;
2. The district courts;
3. The criminal district courts;
4. Courts of domestic relations where they have criminal jurisdiction by legislative enactment;
5. The county courts;
6. All county courts at law with criminal jurisdiction;
7. County criminal courts;
8. Justice courts; and
9. Corporation courts.

Acts 1965, 59th Leg., vol. 2, p. 317, ch. 722.

TEXAS CODE OF CRIMINAL PROCEDURE,
ARTICLE 4.03:

Art. 4.03. [53] [68-86-87] Court of Criminal Appeals

The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the State in all criminal cases. This Article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court, the county criminal court, or county court at law, in which the fine imposed by the county court, the county criminal court or county court at law shall not exceed one hundred dollars.

Acts 1965, 59th Leg., vol. 2, p. 316, ch. 722.

STATEMENT OF THE CASE

The facts relevant to the question presented by this petition are uncontested and therefore may be introduced to the Court in a summary fashion.

The petitioner, GEORGE MORRIS, is employed as the manager of a retail store located in the Northeast Texas community of Greenville, in Hunt County, Texas. On the Saturday and Sunday of July 29th and 30th, 1978, an investigator from the Hunt County Sheriff's office entered the retail store managed by petitioner and purchased two pairs of socks uniquely labeled as "cheer leader pom poms, team and color co-ordinated sport socks." One pair of the socks was purchased by the investigator on a Saturday and the other pair on a Sunday. The following Monday, petitioner was arrested by the same sheriff's investigator; taken to the county jail; fingerprinted; mug-shot; booked for a violation of the Texas Blue Law, Article 9001; and jailed. Petitioner posted a \$100.00 cash bond with the sheriff and was released from jail pending trial. Subsequently, petitioner was charged by complaint and information by the county attorney for selling the two pairs of socks on the consecutive days of Saturday and Sunday (Appendix A, Pgs. A-1 - A-3). Before trial, petitioner filed his motion to quash the complaint and information for the reason that the law upon which his prosecution was based is repugnant to the Constitution of the United States (Appendix A, Pgs. A-4 - A-8). On August 31, 1978, petitioner appeared ready for trial in the Hunt County Criminal Court. Petitioner's written motion to quash the complaint and information was argued to the County Criminal Court and denied (Appendix B, P. A-17). At the conclusion of trial, the court found the petitioner guilty as charged

and assessed his punishment at a fine of \$100.00, the maximum punishment allowed by §3 of Article 9001 (Appendix B, Pgs. A-31 - A-32).

REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with the due process principles enunciated in this Court's rulings in *Connally v. General Construction Company*, 269 US 385 (1925), and *Hynes v. Mayor of Oradell*, 425 US 610 (1975). Numerous other cases might be cited, but this Court is familiar with the rulings it has applied in the past and that should apply here. The Texas Blue Law, Article 9001, is unconstitutional on its face as a penal statute because it is so vague and ambiguous that men of ordinary intelligence cannot discern its meaning. In fact, criminal proceedings under the statute are rarely brought against offenders because the state usually proceeds with its alternative remedy for a civil injunction under § 4 of the Article in order to avoid the constitutional questions of due process inherent in the penal construction of the law. Although this Article, in its present form and designation, has been in existence since 1973, not one single criminal case has been reviewed by the highest court for criminal matters, the Texas Court of Criminal Appeals. Not since 1964 in *Ex Parte Wilson*, 374 SW 2d 229, has the Texas Court of Criminal Appeals had the opportunity to rule on any criminal proceeding brought under a Texas Blue Law.²

Today as a direct result of the state legislature's efforts

2. In *Ex Parte Wilson*, the Texas Court of Criminal Appeals reviewed the ancestor of Article 9001 (Penal Code Article 286a, which is set forth in Appendix C) but did not consider the constitutional questions raised here.

to be overly precise by enumerating forty-two categories of merchandise that cannot be sold on the consecutive days of Saturday and Sunday, the people of Texas must attempt to navigate a statutory maze beset with confusing redundancies, arcane colloquialisms and words that derive their meaning from personal judgment and opinion.

As an example of confusing redundancies, the petitioner invites the Court's attention to the fact that although the statutes specifically forbids clothing, it proceeds to specifically forbid items that might ordinarily be thought of as clothing, such as footwear, headwear, and clothing accessories. The statute also forbids kitchenware, and then forbids kitchen utensils, just as if kitchen utensils are not a part of kitchenware. This law forbids appliances, and proceeds to forbid stoves, refrigerators, air conditioners, electric fans, washing machines, and driers as if these items are something else besides appliances. The redundancy in the law is confusing because it allows for too many distinctions without a difference. If a refrigerator is not an appliance then exactly what is an appliance? If clothing is not wearing apparel, then exactly what is clothing? If kitchen utensils are not kitchenware, then what is kitchenware? This law goes beyond enunciating a general category followed by specifically included items. This law purports to distinguish general categories that are synonymous, which is an impossible feat. There is no difference between wearing apparel and clothing in any accepted dictionary of the English Language.

As an example of arcane colloquialisms, the petitioner asks the Court to consider the terms "headwear" and "footwear." These words are subject to a broad speculation as to their meaning and could conceivably apply to any marketable

item that could possibly be worn upon the head and foot of man or beast.

As an example of words that derive their meaning from personal judgment or opinion, the petitioner asks the Court to observe that Article 9001 forbids the sale of toys, excluding items customarily sold as novelties or souvenirs. Petitioner contends that no one can determine with any certainty what constitutes a "toy," nor can anyone determine with certainty what is "customarily sold." Petitioner contends that what is a "novelty" or "souvenir," depends upon an individual's personal judgment or opinion, where that individual is from, and what might appeal to his mood or fancy at a particular time. What a "novelty" or "souvenir" may be depends as much upon the opinion and judgment of the buyer as it does upon the seller. Furthermore, in a small Texas community, such as the town of Greenville where petitioner conducts his business, what is customarily sold may be difficult to determine. This law assumes that a community be large enough for a survey to be taken among different merchants as to what is customarily sold.

Petitioner also questions the vagueness of § 2 of Article 9001 wherein an exemption from the law is allowed for "sales for charitable purposes." The statute provides no clue as to what are "charitable purposes," which is a question similarly considered by this Court in *Hynes*. Is it a "charitable purpose" to sell an overcoat to a man without on a wintry day? Or does the exemption only apply if the money derived from sales is donated to some worthy cause? Shall the amount of the donation be net profit or gross receipts from sales? What procedure must petitioner follow to avail himself of the exemption? These questions, and others in

the same vein, are left unanswered by the statute. Apparently, whether or not the exemption applies to petitioner depends upon the opinion of an unnamed authority within the law enforcement process.

2. The petitioner attacks Article 9001 as violating due process of law by its unintelligible reference to the repealed state's statutes designated as Articles 286 and 287 of the former penal code (Appendix C).

First, the state legislature states in § 5a of Article 9001 that these articles are not to be considered as repealed. Secondly, the legislature further states in § 5a that the provisions of Articles 286 and 187, shall not apply to sales of items listed in § 1 of Article 9001. And last, the legislature repealed Articles 286 and 287 in the same enactment that created Article 9001 when the penal code was revised in 1973.³

The petitioner is asking this Court to review his conviction for crime under a state statute wherein the legislature has said in effect to GEORGE MORRIS: Article 9001 is now the present law. Please refer yourself to the former Articles 286 and 287. They are not repealed and they do not apply to § 1 of the present law; however, they are repealed.

No man of ordinary intelligence can cope with such unclear legislative pronouncements and feel secure from the risk of arrest and conviction.

3. Articles 286 and 287 were repealed by Acts 1973, 63rd. Leg., P. 991, ch. 399, § 3(a), enacting the present Texas Penal Code.

CONCLUSION

This Court should grant the writ of certiorari to the Hunt County Court because the statute is unconstitutionally vague for the reasons stated above, and for the additional reason that petitioner has no other available forum to take his conviction for review. The federal question is substantial because Article 9001 effects not only the due process rights of all retail merchants in the state, such as petitioner, but also the law has an indirect and substantial effect upon the millions of Texas citizens who are retail customers.

Joseph A. Pitner
Attorney for Petitioner
1266 E. Ledbetter Dr.
Dallas, Texas 75216
214/ 371-2395

CERTIFICATE OF SERVICE

I, Joseph A. Pitner, do hereby certify that on this 17th day of November, 1978, a true and correct copy of the above petition for writ of certiorari was mailed to John L. Hill, Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas, 78711, attorney for respondent, State of Texas.

Joseph A. Pitner

APPENDIX A

State's Complaint and Information

GENERAL COMPLAINT FORM - BLUE LAW

**IN THE NAME AND BY THE AUTHORITY OF THE
STATE OF TEXAS**

I, Jim Bobbitt, solemnly swear that I have reason to believe and do believe that George Morris, on or about the 30th day of July, A.D. 1978, and before the filing of this Complaint, in the County of Hunt, the State of Texas, did then and there unlawfully on both two (2) consecutive days of Saturday and Sunday, to-wit: July 29, 1978, and July 30, 1978, sell and offer for sale and compel, force and oblige his employees to sell clothing, clothing accessories, wearing apparel, footwear; headwear; home, business, office or outdoor furniture; kitchenware; kitchen utensils; china; home appliances; stoves; refrigerators; air conditioners; electric fans; radios; television sets; washing machines; driers; cameras; hardware; tools, excluding non-power driven hand tools; jewelry; precious and semi-precious stones, silverware; watches; clocks; luggage; motor vehicles; musical instruments; recordings; toys, excluding items customarily sold as novelties and souvenirs; mattresses; bed coverings; household linens; floor coverings; lamps; draperies; blinds; curtains; mirrors; lawn mowers and cloth piece goods, to-wit: cheer leader pom poms, team and school color co-ordinated sport socks against the peace and dignity of the State.

s/ Jim Bobbitt
COMPLAINANT

A-2

Sworn to and subscribed before me this 31st day of July,
A.D. 1978.

s/ F. Duncan Thomas
ASSISTANT COUNTY
ATTORNEY
HUNT COUNTY, TEXAS

A-3

GENERAL INFORMATION FORM - BLUE LAW
IN THE NAME AND BY THE AUTHORITY OF THE
STATE OF TEXAS

I, Frederick C. Shelton, Jr., County Attorney of the County of Hunt, State aforesaid, in behalf of said State presents in the County Court at Law of said County, at the July Term, A.D. 1978, of said Court, that George Morris, on or about the 30th day of July A.D. One Thousand Nine-Hundred Seventy-Eight, and before the filing of this Information, in the County of Hunt and State of Texas did then and there unlawfully on both two (2) consecutive days of Saturday and Sunday, to-wit: July 29, 1978, and July 30, 1978 sell and offer for sale and compel, force and oblige his employees to sell clothing, clothing accessories, wearing apparel; footwear; kitchen utensils; china; home appliances; stoves; refrigerators; air conditioners; electric fans; radios; television sets; washing machines; driers; cameras; hardware; tools, excluding non-power driven hand tools; jewelry; precious and semi-precious stones; silverware; watches; clocks; luggage; motor vehicles; musical instruments; recordings; toys, excluding items customarily sold as novelties and souvenirs; mattresses; bed coverings; household linens; floor coverings; lamps; draperies; blinds; curtains; mirrors; lawn mowers and cloth piece goods, to wit: cheer leader pom poms, team and school color co-ordinated sport socks against the peace and dignity of the State.

s/ Frederick C. Shelton, Jr.
COUNTY ATTORNEY
HUNT COUNTY, TEXAS
s/ F. Duncan Thomas
ASSISTANT COUNTY
ATTORNEY
HUNT COUNTY, TEXAS

A-4

NO. CR 1257 - 78

Filed: Aug. 25, 1978

DEFENDANT'S MOTION TO QUASH

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now George Morris, the Defendant in the above styled and numbered cause, and by and through his attorney of record, Joseph A. Pitner, presents this Motion to Quash the complaint and information as filed against him in this cause for violation of Article 9001, Texas Revised Civil Statutes, and as grounds therefor would respectfully show the Court the following:

1

Article 9001, Texas Revised Civil Statutes, upon which the prosecution is based, is void and unconstitutional as repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that said Article is overbroad and contains such vague regulations of expression that men of common intelligence cannot discern or agree upon the area of illegal conduct prohibited by the Article.

A-5

II.

Article 9001, Texas Revised Civil Statutes, upon which the prosecution is based, is void and unconstitutional as repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that said Article contains regulations that are unjust, unreasonable, and confiscatory and would deprive this Defendant of his property and personal liberty without due process of law.

III.

Article 9001, Texas Revised Civil Statutes, upon which the prosecution is based, is void and unconstitutional as repugnant to the Ex Post Facto Clause of Article 1, § 10, to the Constitution of the United States in that said Article contains proscribed categories of items incapable of a certain definition by any common linguistic standard and thereby allows the uncertainties of subsequent judicial lexicographics to be retroactively applied to the conduct of this Defendant.

IV

Article 9001, Texas Revised Civil Statutes, upon which the prosecution is based, is void and unconstitutional as repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States because it adopts by reference the provisions of repealed state statutes, namely Articles 286 and 287 of the former Penal Code of the State of Texas, which Articles provide for a different punishment and certain defenses denied this Defendant.

A-6

V.

Article 9001, Texas Revised Civil Statutes, upon which the prosecution is based, is void and unconstitutional because its general statutory scheme is repugnant to the First and Fourteenth Amendments to the Constitution of the United States because the Article constitutes a violation of the Establishment Clause and the Free Exercise Clause pertaining to religious beliefs and is sumptuary legislation.

VI.

Article 9001, Texas Revised Civil Statutes, upon which the prosecution is based, is void and unconstitutional as repugnant to the Supremacy Clause, Article 4, of the Constitution of the United States in that said Article is an unreasonable restraint on interstate commerce in violation of and pre-empted by Section 1 of the Sherman Antitrust Act.

VII.

Article 9001, Texas Revised Civil Statutes, upon which the prosecution is based, is void and unconstitutional as repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that the Article capriciously deprives this Defendant of his personal right, by the imposition of penal sanctions, to freely engage in the legitimate business of retail sales on consecutive Saturdays and Sundays with regard to the category of items ambiguously enumerated therein and is therefore an arbitrary and unjust exercise of the police power of the State of Texas.

A-7

VIII.

Article 9001, Texas Revised Civil Statutes, upon which the prosecution is based, is void and unconstitutional as repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that the Article determines the gravamen of the offense, a "public nuisance", in advance of any jury or judicial finding and therefore unlawfully deprives this Defendant of any defense known to the general body of criminal law which would tend to justify, excuse or mitigate his actions which are the genesis of the complaint and information filed against him in the case at bar.

IX.

Article 9001, Texas Revised Civil Statutes, upon which the prosecution is based, is void and unconstitutional on its face as repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that the Article accords the State of Texas the unique and unprecedeted power to contemporaneously join a civil action with a criminal action in a solitary trial against this Defendant, thereby altering the burden of proof required in criminal trials, reasonable doubt, to the burden of proof required in civil trials, preponderance of the evidence.

X.

Article 9001, Texas Revised Civil Statutes, upon which the prosecution is based, is void and unconstitutional as repugnant to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States because § 5

of Acts 1973, 63rd Legislature, page 995, chapter 399, enacting the present Penal Code of the State of Texas, transferred Article 286a to Article 9001, Texas Revised Civil Statutes, which Article 286a read thus: "Application of article 286 to the bowling alleys. The provisions of Article 286, Penal Code of Texas, 1925, shall not be applicable to bowling alleys."

WHEREFORE, PREMISES CONSIDERED, Defendant George Morris prays that this Honorable Court grant his Motion to Quash the information and complaint upon the grounds that Article 9001, Texas Revised Civil Statutes, is unconstitutional and void.

Respectfully submitted,

s/ Joseph A. Pitner
Joseph A. Pitner
Attorney for Defendant,
George Morris
1266 East Ledbetter Drive
Dallas, Texas 75216
214/371-2395

ORDER

On this the 31 day of August, 1978, came on to be heard the Motion of Defendant George Morris to quash the complaint and information filed against him in the above styled and numbered cause, and the Court having considered the same is of the opinion that the Motion should be overruled.

s/ Phil Fugitt
J U D G E

APPENDIX B

Statement of Facts in County Criminal Court

NO. CR 1257-78

APPEARANCES:

MR. FRED SHELTON
County Attorney
Hunt County, Texas
Greenville, Texas 75401

Appearing for the State

MR. JOSEPH A. PITNER
Attorney at Law
1266 E. Ledbetter Drive
Dallas, Texas 75216

Appearing for the Defendant

BE IT REMEMBERED that on this the 31st day of August A.D., 1978, the above entitled and numbered cause came on for trial before said Honorable Court, HONORABLE PHIL FUGITT, Judge presiding, and the following proceedings were had, to-wit:

THE COURT:

The Court will call cause number CR 1257-78, The State of Texas versus George Morris, an appeal from the Justice Court of Hunt County, Texas.

What says the State?

MR. SHELTON:

The State is ready, Your Honor.

THE COURT:

What says the Defendant?

MR. PITNER:

The Defense is ready, Your Honor.

THE COURT:

For purposes of the record, Counselor, I think we ought to rule on your Motion to Quash before we take testimony.

MR. PITNER:

Yes, Your Honor. I have an argument on my Motion to Quash and I would like to present it to the Court before the Court rules.

May it please the Court:

In the first paragraph of the Defense Motion to Quash, we

have raised the constitutional question that Article 9001 is so vague and ambiguous that men of ordinary intelligence cannot discern its meaning. As a direct result of the State Legislature's efforts to be overly precise by enumerating some forty-two forbidden categories of goods that cannot be sold on the consecutive days of Saturday and Sunday, the people of Texas are left helpless to interpret a law filled with repetition, confusion and words created by literary license.

As an example of the repetition that abounds in Article 9001, the Defense invites the Court's attention to the following synonomous categories: Clothing and wearing apparel, as one example. Drapery, blinds and curtains as another. Kitchenwear and kitchen utensils as still another.

As an example of confusion, the Defense asks the Court to notice that although the Statute specifically forbids clothing, it proceeds to specifically forbid items ordinarily thought of as clothing such as footwear, headwear, and clothing accessories. The statute also forbids kitchenwear and then forbids kitchen utensils just as if kitchen utensils are not part of kitchenwear. This law forbids appliances and then proceeds to forbid stoves, refrigerators, air conditioners, electric fans, washing machines and driers as if these items are something else besides appliances. The law is confusing because it makes so many distinctions without a difference. If a refrigerator isn't an appliance, then exactly what is an appliance? If clothing isn't wearing apparel, then exactly what is clothing? If kitchen utensils aren't kitchenwear, then what is kitchenwear?

As an example of literary license with the English language, the Defense asks that the Court consider the word

"headwear." Now, I could not find the word "headwear" listed in any of the several dictionaries at my office. Apparently, the word "headwear" may not exist outside the context of Article 9001. But I do know one thing about headwear: No Texan ever has, or ever will, walk into any store in this State and ask to buy some headwear.

The word "footwear" also struck me as an unusual noun. I did have better luck with the term "footwear." An old edition of Webster's that I had, a 1946 edition, defined the term "footwear" as a colloquial term meaning wearing apparel for the feet, especially boots, shoes, et cetera. The Defense wonders whether or not your socks would be covered under the definition of et cetera.

I don't want to burden the Court's time any further on the question of vagueness, except to make one further observation. That is: Article 9001 forbids the sale of toys, excluding items customarily sold as novelties and souvenirs. I am not sure that anyone can determine with any certainty what constitutes a "toy." But I am positive that no one can determine what is "customarily sold." And I would have to hazard a guess that what a novelty or souvenir means to a person depends upon where that person is from and what might appeal to his mood or fancy at the time.

Paragraph 2 of our Motion attacks Article 9001 as containing unjust, unreasonable, and confiscatory regulations which deprive Mr. Morris of his property and liberty without due process of law. Article 9001 bears no reasonable relationship to the alleged legislative purpose for its existence which is to promote the health, recreation and welfare of the people of the State of Texas. Oddly enough the law forbids

the sale of merchandise which most folks would consider necessary to their health, recreation and welfare. Clothing is a vital necessity that no person can be without. Everyone needs a roof over his head, but if that roof leaks, the hardware and power tools necessary to repair it cannot be purchased on Sunday if the store chose to sell them on the previous Saturday. Everyone needs to eat, but it is ironic that you can buy a can of chili seven days a week, but not the can opener, or the pot, or the stove, or the bowl, or the spoon, or even the napkin.

Not only is the Blue Law unreasonable, it is also confiscatory. Mr. Morris is unconstitutionally deprived of his property, that property being his profits from sales. Furthermore, the law has deprived him of his personal liberty, that liberty being freedom from arrest. Mr. Morris' liberty is in further jeopardy if he is convicted and chose not to pay the fine imposed. In that event, he would be jailed under a capias pro fine.

Paragraph 3 of our Motion addresses the *ex post facto* application of the law that contains so many indefinite words and phrases that a man of ordinary intelligence cannot possibly decide in advance what conduct the law intends to prohibit. If Mr. Morris sells on consecutive Saturdays and Sundays for instance, a pair of sunglasses, or a wig, or a wooden ladder, is he guilty of selling hardware or headwear? The only way Mr. Morris or anyone else is going to find out the answer to that question is to be arrested, charged, and brought to trial to await an *ex cathedra* definition of those items. The Court's definition of headwear and hardware will then be retroactively applied to the conduct of the Defendant. The best example of this principle that I can think

of at this time is of a baseball player trying to argue with an umpire as to whether or not a hit ball is fair or foul. I was in this position at one time and was having an argument with the umpire on this very point. He squinted one eye at me and said, "Son, it ain't nothing, 'til I call it." The point is: Is a wig headwear or a cosmetic item? Or is it nothing until the Court calls it?

In paragraph 4 of the Motion, the Defense attacks Article 9001 as violating due process of law by its confusing reference to the repealed State Statutes designated as Articles 286 and 286 of the former Penal Code. First, the Legislature states in the last section of Article 9001 that these Articles are not to be considered as repealed. Secondly, the Legislature goes on to say that the provisions of Articles 286 and 287 shall not apply to sales of items listed in Section 1 of the Act. And last, the Legislature repeals Articles 286 and 287 in the same breath that creates Article 9001, when it revised the Penal Code in 1973. In court today we have the situation where Mr. Morris is charged with a crime under a statute wherein the Legislature has said, in effect, to Mr. Morris: Refer yourself to Articles 286 and 287. They are not repealed; but they do not fully apply; however, they are repealed. I defy any man of ordinary intelligence to figure that one out.

Paragraph 5 of our Motion brings up the delicate question of separation of church and state as guaranteed by the First Amendment. Article 9001 has not lost its religious character because of a little legislative cosmetic surgery. Article 9001 used to be a Sunday closing law. It is now a Saturday or Sunday closing law. But Article 9001 still remains a Sabbath day law, but as the Court knows, whether or not Satur-

day or Sunday is a Sabbath day depends upon what religious belief a person would happen to follow. But the Legislature has stated in Article 9001 that the purpose of this law is to promote social good, that is the health, recreation and welfare of the people. The Defense contends that the State Legislature has tried deliberately to evade the mandate of the First Amendment of the Constitution. All Blue Laws are so called because the Puritans bound their Sunday observance laws with blue paper. There is no doubt that Article 9001 is such a Blue Law. Even the complaint and information filed in this case are headed "Violation of the Blue Law." But no matter what the stated purpose of Article 9001 may be, the fact remains that the law has the effect of imposing the Fourth Commandment of the Lord upon the people of the State of Texas. Article 9001 then serves to protect a religious conviction with the threat of a criminal conviction.

In paragraph 6, the Defense contends that Article 9001 is preempted by the Sherman Antitrust Act. The bottom line of the Texas Blue Law is to foster anti-competitive behavior. Section 4 of Article 9001 is an open invitation to merchants to join together in combination to prohibit by civil injunction any competitor from selling the prohibited items on consecutive Saturdays and Sundays. Additionally, Article 9001 contains a criminal penalty. Seldom in the face of existing antitrust laws have one group of merchants had such an instrument of control over competitors who wish to profit by weekend sales.

In paragraph 7, the Defense questions Article 9001 as an arbitrary and unjust exercise of the police power of the State. The Blue Law denies George Morris his personal right to make his living by the retail sale of the forty-two forbidden items on consecutive Saturdays and Sundays. The law

makes George Morris a criminal for a day if he sells socks on Sunday that he offered or sold on the previous Saturday. This kind of oppressive and arbitrary police power may be acceptable in a dictatorial country, but it certainly is not acceptable in the State of Texas.

In paragraph 8, the Defense complains that Article 9001 deprives George Morris of any defense known to the general body of criminal law. Article 9001 imposes a strict criminal liability, one which is usually reserved for business entities rather than flesh and blood human beings. Under Article 9001, no justification, excuse or mitigation (in other words, no defense) can be interposed to protect George Morris. But the fact is George Morris is no business entity subject to a strict liability regulatory law. He is a flesh and blood human being who can be arrested, fined and even sent to jail.

In paragraph 9, the Defense contends that Article 9001 is written in such a manner as to allow the State of Texas to bring one single action against the defendant and charge him with both the tort of public nuisance and the crime of public nuisance as defined in Article 9001. The State could ask the County Court for injunctive relief and a criminal penalty both in the same lawsuit. A reading of the Article contains nothing that would prohibit such a procedure. Article 9001 is therefore void on its face as repugnant to due process of law.

In paragraph 10, the Defense would note to the Court that under the former Penal Code two Articles designated as 286a existed. In 1973 the Legislature transferred one of these Articles 286a to the Civil Statutes as Article 9001. However, both Articles 286a covered the same subject matter, the Sun-

day Blue Laws. Because both Articles were void at that time because of the fatal identical designations as Article 286a, the Defense contends that a void Article was therefore transferred as Article 9001 into the Revised Civil Statutes.

Your Honor, this concludes the Defense's argument on the Motion to Quash.

THE COURT:

What says the State?

MR. SHELTON:

Your Honor, the State believes that the Statute is plain on its face and would ask the Defendant's Motion be overruled.

THE COURT:

I'll overrule your Motion.

You may proceed.

MR. SHELTON:

The State would call Jim Bobbitt to the stand.

JAMES BOBBITT,

having been first duly sworn by the Court to testify the truth the whole truth and nothing but the truth, testified on his oath as follows:

DIRECT EXAMINATION

BY MR. SHELTON:

Q Would you state your name?

A Jim Bobbitt.

Q And your employment?

A Investigator, Hunt County Sheriff's Department.

Q How long have you held that position?

A Let's see, approximately twenty months.

Q At the request of the County Attorney's Office, did you investigate the alleged violation of Section 9001, commonly referred to as the Blue Law Statute?

A Yes, sir, I did.

Q I will now ask the Court Reporter to mark for identification a sack with a cash register tag showing the date 7-29-78 for identification purposes.

(Whereupon an instrument was handed to the Court Reporter to be marked for identification as State's Exhibit No. 1.)

Q (By Mr. Shelton) During your investigation did you proceed to the Gibson's Discount Store in Greenville, Texas, and make this purchase, that is contained in the sack that has

just been marked for identification purposes?

A Yes.

Q Is this your handwriting?

A Yes, sir.

Q After making this purchase of this item, it was in your care, custody and control until you turned it over to the County Attorney's Office?

A Yes, sir.

MR. SHELTON:

I'll show it to the Defendant.

MR. PITNER:

Your Honor, we object to the item that has just been shown to us, that no foundation of relevancy has been established for its introduction into evidence. We don't know what forbidden item that may be, if any.

MR. SHELTON:

Just a minute, Your Honor. I will take care of that question.

Q (By Mr. Shelton) Would you state the item that you did purchase at that time?

A It's Sports Socks, Team and School Colored Sports Socks.

Q "Cheerleader Pompoms Team and School Color Coordinated Sport Socks," is the title?

A Yes, sir, common known to me as "booties."

MR. SHELTON:

I would ask at this time, Your Honor, that this be admitted into evidence.

MR. PITNER:

Your Honor, we object to it being admitted into evidence because it still hasn't been shown to be relevant to this case, as to which forbidden category, if any, that those Cheerleader Pompom Team and Sport Coordinated Sports Socks (sic) falls into.

THE COURT:

I will let him develop it if he wants to.

I'll overrule your objection.

MR. SHELTON:

Your Honor, we believe that this item specifically is footwear, which Section 9001 specifically forbids for sale on two consecutive days, Saturday and Sunday.

THE COURT:

Admitted.

MR. SHELTON:

I will ask the Court Reporter to mark for identification--

MR. PITNER:

I would like for the Court to note my exception to the item being incorporated.

MR. SHELTON:

I will ask the Court Reporter to mark for identification another sack containing an identical item, "Cheerleader Pompom Team and School Coordinated Colored Sports Socks," contained in a sack, tag dated 7-30-78.

(Whereupon an instrument was handed to the Court Reporter to be marked for identification as State's Exhibit No. 2.)

Q (By Mr. Shelton) Now, July 29th was a Saturday and you went in on the following Sunday; is that correct, Mr. Bobbitt?

A Yes, sir, the next day.

Q And you did make this purchase?

A Yes, sir, I did.

Q And this was in your care, custody and control until you

turned it over to the Hunt County Attorney's Office; is that correct?

A Yes, sir.

Q This would be your initials on the sack?

A Yes, sir.

Q Again, you did purchase "Cheerleaders Pompoms, Team and School Color Coordinated Sport Socks"?

A I did, sir.

MR. SHELTON:

We will give this to the Defendant and his attorney.

MR. PITNER:

Your Honor, we would make the same objection to this item being admitted into evidence as being identified as falling into any one of forty-two forbidden categories under Article 9001.

MR. SHELTON:

At this time, Your Honor, we would ask that it be admitted into evidence.

THE COURT:

Admitted.

MR. SHELTON:

Pass the witness.

CROSS-EXAMINATION

BY MR. PITNER:

Q Captain Bobbitt, where did you obtain the money to make your purchases at the Gibson's store?

A Out of my pocket.

Q Do you know what connection or what job title that the Defendant, George Morris, has with the Gibson Discount Store?

A I only understand. I don't know for a fact, but I understand he is the manager of the store.

Q Captain Bobbitt, do you remember who sold these socks to you?

A One of the sale clerks.

Q At the Gibson store?

A Yes, sir.

Q These purchases did occur in Hunt County, Texas?

A Yes, sir.

Q Do you remember what time of the day on Sunday, July

30th, you bought these Cheerleader, et cetera socks?

A Yes, sir. It would have been approximately 4:00 o'clock.

Q In the afternoon?

A Yes, sir, in the afternoon.

Q Would you know of any private persons or organizations that have demanded stricter enforcement of the Blue Laws here in Hunt County, Texas?

A That I know of?

Q Yes, sir.

A No, sir.

Q Do you know who, if anyone, complained to the Hunt County Attorney's Office about stricter enforcement of the Blue Laws in this particular case?

A No, sir, I don't know.

Q Have you ever been in the Gibson's store on a regular weekday, a Monday through Friday?

A Yes, sir.

Q Well, did you observe anything out of the ordinary at the Gibson's store when you shopped there on Saturday, July 29th, and Sunday, July the 30th, for these Pompom Socks?

A Anything out of the ordinary?

Q Yes, sir.

A I remember two things that seemed sort of out of the ordinary to me.

Q Would you please tell me what those are?

A On both days I noticed that there was a tremendous amount of tags on everything and reduced sales. I hadn't noticed that before. I noticed on Sunday quite a volume of traffic there. That impressed me. Those were the only things.

Q Other than that, those two weekend days of Saturday and Sunday were no different from any other shopping day on any other day of the week that you had been in that store?

A I didn't notice anything different.

Q What, if anything, did you observe on July the 29th or July the 30th that took place at the Gibson's store that might have injured the health, recreation or welfare of the people of the State of Texas?

MR. SHELTON:

Your Honor, I object. I don't think he is qualified to answer that.

MR. PINTER:

Your Honor, I would say that he is a sworn police officer

and has sworn to uphold the law, and he could offer an opinion on that.

THE COURT:

I'll sustain the objection on the account of the fact that it's the dominion of the Court to decide whether or not -- to decide the facts as to whether or not that is such an offense.

You may proceed.

Q (By Mr. Pitner) Captain, did anyone tell you what to buy as evidence in this case?

A No, sir.

Q Well, did anyone explain to you why you may have to buy certain items and not other items?

A I read the Articles, sir.

Q You actually read this Article 9001?

A Yes, sir, I did. I refer to it as the Blue Law.

Q As the Blue Law?

A Uh-huh.

Q Did you find this law clear and precise reading, understandable?

A I found it understandable, yes, sir.

Q These socks that you bought, would you say that they are ordinary or unusual socks?

A I have to answer that question as to the way I see them, Counselor. I find them quite ordinary.

Q These socks would be, in your opinion, socks that a person would use for everyday wear?

A Yes, sir.

Q I notice the bags on those socks haven't been opened. Are you fully aware of what those socks look like?

A Uh-huh.

Q Is that the type of item that you would see a lady wear to the office, for instance?

A No.

Q Where would these items ordinarily be worn, if you know?

A I have three kids that wear them everyday.

Q So you wouldn't say that these socks are unusual enough to be costume items?

A No.

Q They would not be part of a cheerleader's --

A No as far as -- you know, you're asking me?

Q Yes, sir.

A No, sir.

Q They wouldn't be part of a cheerleader's costume?

A I don't know. I don't have any relation to that, you know, particular profession or extracurricular activity.

Q Captain, was George Morris arrested subsequent to a search warrant?

A Yes, sir.

Q Were you one of the arresting officers?

A I was the arresting officer.

Q Was the arrest of George Morris handled like any other misdemeanor arrest?

A Yes, sir.

Q Was he taken to jail and fingerprinted and mug shot and booked into the Hunt County jail?

A I would have to presume that is so because I booked him in. Of course, I don't handle the fingerprinting and so forth. I filled out the arrest report.

Q As far as you know, routine procedure was followed?

A Yes, sir.

Q You stated previously that you had read the Texas Blue Law. Would you arrest Mr. Morris if he sold wigs on consecutive days of Saturday and Sunday?

A Well, now you're asking me to try to in my mind go back and reread that law. I can't do it. I would have to check the law to see if it was a violation.

Q Would your answer be the same for wooden ladders?

A Yes, sir.

Q Could you tell the Court how far the Gibson's store is from Interstate 30?

A It's approximately half a mile.

Q Approximately how far is Greenville from the Oklahoma border?

A Oklahoma state line?

Q Yes, sir.

A Again, it would have to be approximate. According to the direction you're going, one way, fifty miles.

Q Do folks from Oklahoma usually shop in Greenville?

A I have no idea.

Q Being a police officer, do you see Oklahoma license plates parked outside the stores here in Greenville?

A I don't believe I have ever seen one parked outside of a store in Greenville.

MR. PITNER:

I have no further questions.

MR. SHELTON:

No questions.

THE COURT:

May this officer be excused to return to his duties?

MR. SHELTON:

Yes, Your Honor.

MR. PITNER:

Yes, Your Honor.

THE COURT:

Thank you.

MR. SHELTON:

The State rests, Your Honor.

MR. PITNER:

Your Honor, the Defense would call no witnesses, offer

no evidence in this case.

THE COURT:

Both sides rest?

MR. SHELTON:

Yes, Your Honor.

MR. PITNER:

Yes, Your Honor.

THE COURT:

Arguments?

MR. SHELTON:

Your Honor, the State would just say in closing, we feel the items that were bought on two consecutive days, the State maintains that they fit under the Statute under foot-wear. We would ask that the Court so find.

The State closes.

MR. PITNER:

Close.

THE COURT:

I will find the Defendant guilty and assess a fine of one

hundred dollars.

MR. PITNER:

Your Honor, at this time the Defense would like to give notice to the Court of its intended appeal to the Supreme Court of the United States by virtue of 28 United States Code, Section 1257.

Thank you.

* * * * *

STATE OF TEXAS

COUNTY OF DALLAS

I, David M. Ivy, Jr., a Certified Shorthand Reporter in and for the State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all the proceedings (or all proceedings directed by counsel to be included in the statement of facts, as the case may be), in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this transcription of the record of the proceedings truly and correctly reflects the exhibits, if any, offered by the respective parties.

WITNESS my hand this the day of , 1978.

David M. Ivy, Jr.
Certified Shorthand Reporter
In and for the State of Texas

ATTORNEYS' APPROVAL

We, the undersigned attorneys of record for the respective parties, do hereby agree that the foregoing pages constitute a true and correct transcription (or, a true and correct partial transcription as requested, as the case may be) of the statement of facts, and other proceedings in the above styled and numbered cause, all of which occurred in open court or in chambers and were reported by the Certified Shorthand Reporter.

SIGNED this day of , 1978.

Mr. Fred Shelton,
Attorney for the State

SIGNED this day of , 1978.

Mr. Joseph A. Pitner,
Attorney for the Defendant

COURT'S APPROVAL

The within and foregoing pages, including this page, having been examined by the Court, (counsel for the parties having failed to agree) are found to be a true and correct transcription (or, a true and correct partial transcription as requested, as the case may be) of the statement of facts and other proceedings, all of which occurred in open court or in chambers and were reported by the Certified Shorthand Reporter.

SIGNED this day of , 1978.

PHIL FUGITT,
Judge Presiding

APPENDIX C

Former Penal Code Sunday Laws, Articles 286, 286(a) and 287)

FORMER PENAL CODE - REPEALED BY ACTS 1973, 63rd LEGISLATURE, P. 991, CH. 399, § 3(a) ENACTING THE PRESENT TEXAS PENAL CODE.

Art. 286. [302] [199] [186] Selling goods on Sunday

Any merchant, grocer, or dealer in wares or merchandise, or trader in any business whatsoever, or the proprietor of any place of public amusement, or the agent or employe of any such person, who shall sell, barter, or permit his place of business or place of public amusement to be open for the purpose of traffic or public amusement on Sunday, shall be fined not less than twenty nor more than fifty dollars. The term place of public amusement, shall be construed to mean circuses, theaters, variety theaters and such other amusements as are exhibited and for which an admission fee is charged; and shall also include dances at disorderly houses, low dives and places of like character, with or without fees for admission.

Art. 286a, including the caption, reads:

"An Act to prohibit the sale or offer of sale, on both the two

(2) consecutive days of Saturday and Sunday, or the compelling, forcing, or obliging of employees to sell certain named items; providing exemptions;

declaring violation to be a nuisance and authorizing persons to apply and obtain injunctions restraining violations of this Act; and declaring an emergency.

"Be it enacted by the Legislature of the State of Texas:

"Section 1. Any person, on both the two (2) consecutive days of Saturday and Sunday, who sells or offers for sale or shall compel, force or oblige his employees to sell any clothing; clothing accessories; wearing apparel; footwear; headwear; home, business, office or outdoor furniture; kitchenware; kitchen utensils; china; home appliances; stoves; refrigerators; air conditioners; electric fans; radios; television sets; washing machines; driers; cameras; hardware; tools, excluding non-power driven hand tools; jewelry; precious or semi-precious stones; silverware; watches; clocks; luggage; motor vehicles; musical instruments; recordings; toys, excluding items customarily sold as novelties and souvenirs; mattresses; bed covering; household linens; floor coverings; lamps; draperies; blinds; curtains; mirrors; lawn mowers or cloth piece goods shall be guilty of a misdemeanor. Each separate sale shall constitute a separate offense.

"Sec. 2. Nothing herein shall apply to any sale or sales for charitable purposes or to items used for funeral or burial purposes or to items sold as a part of or in conjunction with the sale of real property.

"Sec. 3. For the first offense under this Act, the punishment shall be by fine of not more than One Hundred Dollars (\$100.00). If it is shown upon the trial of a case involving a violation of this Act that defendant has been once before convicted of the same offense, he shall on his second conviction and on all subsequent convictions be punished by imprisonment in jail not exceeding six (6) months or by a fine of not more than Five Hundred Dollars (\$500.00), or both.

"Sec. 4. The purpose of this Act being to promote the health, recreation and welfare of the people of this state, the operation of any business whether by any individual, partnership or corporation contrary to the provisions of this Act is declared to be a public nuisance and any person may apply to any court of competent jurisdiction for and may obtain an injunction restraining such violation of this Act. Such proceedings shall be guided by the rules of other injunction proceedings.

"Sec. 4a. When a purchaser will certify in writing that a purchase of an item of personal property is needed as an emergency for the welfare, health or safety of human or animal life and such purchase is an emergency purchase to protect the health, welfare or safety of human or animal life, then this Act shall not apply; provided such certification signed by the purchaser is retained by the merchant for proper inspection for a period of one (1) year.

"Sec. 5. Occasional sales of any item named herein by a person not engaged in the business of selling such item shall be exempt from this Act.

"Sec. 5a. It is the intent of the Legislature that Article 286 and 287 of the Penal Code of Texas are not to be considered as repealed by this Act; provided, however, that the provisions of said Articles shall not apply to sales of items listed in Section 1 of this Act which are forbidden to be sold on the day or days named in this Act.

"Sec. 6. The fact that there are not now adequate laws to prevent the selling of certain articles seven (7) consecutive days and the further fact that legislation is needed to prevent and punish such offense creates an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and said Rule is hereby suspended; and that this Act shall take effect and be in force from and after its passage, and it is so enacted."

Art. 287. Permitting sale of certain articles on Sunday; regulations as to motion picture shows

The preceding Article shall not apply to markets or dealers in provisions as to sales of provisions made by them before nine o'clock A.M., nor to the sales of burial or shrouding material, newspapers, ice, ice cream, milk, nor to any sending of telegraph or telephone messages at any hour of the day or night, nor to keepers of drug stores, hotels, boarding houses, restaurants, livery stables, bath houses, or ice dealers, nor to

telegraph or telephone offices, nor to sales of gasoline, or other motor fuel, nor to vehicle lubricants nor to motion picture shows, or theatres operated in any incorporated city or town, after one o'clock P.M.

Amended by Acts 1931, 42nd Leg., p. 195, ch. 116 § 1.